

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 138 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

and

Hon'ble MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes.

2. To be referred to the Reporter or not? No. @

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3. Whether Their Lordships wish to see the fair copy
of the judgement? No.

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No.

5. Whether it is to be circulated to the Civil Judge?
- No.

STATE OF GUJARAT

Versus

BACHUBHAI JODHABHAI

Appearance:

MR MA BUKHARI, APP for the appellant.

MR PM THAKKAR for the respondents.

CORAM : MR.JUSTICE J.M.PANCHAL and

MR.JUSTICE M.H.KADRI

Date of decision: 04/12/96

ORAL JUDGEMENT (per Kadri, J.)

The State of Gujarat, by filing this appeal under S. 378 of the Code of Criminal Procedure, 1973 (for short 'the Code') has challenged legality and validity of the judgment and order dated November 2, 1984, passed by the learned Addl. Sessions Judge, Bhavnagar, in Sessions Case No. 70 of 1984, whereby the learned Addl. Sessions Judge acquitted the respondents of the charges framed against them for the offences punishable under Ss.302, 447 read with S.34 of the I.P.Code and S.161 of the Gujuarat Panchayats Act, 1961.

2. The prosecution case as unfolded at the trial is summarised as under :

Complainant Jethabhai Raghavbhai was resident of Village Nava Ishvaria, and was staying with his parents. His family had 65 bighas of land. He had two brothers. His elder brother is Bhimjibhai and Talasi is younger. Out of 65 bighas of land, 37 bighas comprises of a Vadi. This Vadi is situated on the south of the Village. In one bigha of land 'Rajuka' crop was raised. On 21.4.1984, Raghavbhai Valabhai, the father of the complainant went to his aforesaid vadi. After he went to the vadi, Talasi, younger brother of the complainant came back to his house. At 2.00 p.m. the complainant was at his house and at that time, his paternal aunt's son Khimji Nagaji came to his house to fetch meals for Raghavbhai Valabhai. Complainant's mother gave meals to Khimji, and thereafter Khimji went to the vadi to give meals to Raghavbhai Valabhai. At about 3.00 p.m. complainant's grand father's son Dhanjibhai Ganeshbhai, Dharamshi Karsanbhai and his paternal aunt's son Khimji brought Raghavbhai Valabhai in a cart, in a bleeding and unconscious condition. Raghavbhai Valabhai had sustained injuries on the middle portion of the head, on the forehead and eyes, and he was bleeding from the head. Complainant called his father, but he did not speak and he was in an unconscious state. Khimji Nagaji told the complainant that when he went with meals to give Raghavbhai Valabhai, he was not found in the Vadi, and when he went to the adjoining Vadi, he saw Raghavbhai

Valabhai lying unconscious.

Thereafter Raghavbhai Valabhai was removed in a tractor to Gadhada Hospital, where the doctor on duty examined him and declared him dead. Complainant Jetha Raghav thereafter went to Gadhada Police Station to lodge his complaint. Police Station Officer Mahadevbhai Ababhai recorded the complaint from Jetha Raghav at 17.0 hours and made entry in the register. The investigation was handed over to Head Constable Chatursinh Daulatsing of Gadhada Police Station. As the offence was of serious nature, PSI Simpi took over the investigation, and held the inquest on the dead body of Raghavbhai Valabhai, and sent it for postmortem to Gadhada Hospital. Postmortem of the dead body of Raghavbhai Valabhai was carried out by Dr.Sureh Anopchand Desai who was working as Medical Officer at the Gadhada Hospital. PSI Simpi thereafter recorded statements of witnesses and prepared panchnama of the scene of offence. On 22.4.1984 at about 16.30 hours, both the respondents presented themselves before the Investigating Officer, PSI Simpi. At that time respondent no.1 lodged a non-cognizable complaint before PSI Simpi which was sent to Gadhada Police Station for registration. The complaint lodged by respondent no.1 is produced at Mark-A on the record of the case. As the assailants were not known to the witnesses, PSI Simpi wrote a yadi to the Executive Magistrate to hold test identification parade of the assailants, and accordingly test identification parade was held by the Executive Magistrate on 23.4.1984, and the present respondents were identified as the assailants who had trespassed in the Vadi alongwith their cattle and committed murder of deceased Raghavbhai Valabhai. It is alleged that at the time of filing the NC complaint, accused no.1 had also produced the muddamal stick with which he had caused injuries to deceased Raghavbhai Valabhai. Arrest panchnama of the respondents was drawn on 22.4.1984 between 16.45 hours and 17.50 hours. Panchnama about the discovery of weapons and clothes of the deceased was also drawn under S.27 of the Indian Evidence Act. PSi Simpi sent the muddamal stick and clothes of the deceased for analysis to the Forensic Science Laboratory. After receiving the report of the FSL, the postmortem notes and on completion of the investigation, charge-sheet came to be filed against the respondents in the court of the learned Judicial Magistrate First Class, Gadhada for offences under Ss.447, 302 read with S. 34 of the I.P.Code and also under S.161 of the Gujarat Panchayats Act. As the offence under S.302 of the I.P.Code is exclusively triable by the Court of Sessions, the case was committed to the Sessions Court, at Bhavnagar, which

was registered as Sessions Case No. 70 of 1984. Thereafter the said case was transferred to the Court of the learned Addl. Sessions Judge, Bhavnagar.

3. Charge Ex.3 was framed against the respondents for offence punishable under S.447 read with S.34 and S.302 read with S.34 of the I.P.Code and also under S.161 of the Gujarat Panchayats Act. Charge was read over and explained to the accused-respondents. The accused pleaded not guilty to the charge and claimed to be tried.

4. In order to bring home the charge against the respondents, prosecution examined the following witnesses:

PW 1 Ex. 7 Dr.Suresh Anopchand Desai,
PW 2 Ex. 11 Complainant Jethabhai Raghavbhai,
PW 3 Ex. 13 Jethabhai Raghavbhai Chudasama,
PW 4 Ex. 16 Mohanbhai Talusibhai,
PW 5 Ex. 18 Dhanji Ganesh,
PW 6 Ex. 19 Govind Ganesh,
PW 7 Ex. 20 Makod Laxman,
PW 8 Ex. 23 Khima Nagaji,
PW 9 Ex. 25 Savaji Ramaji,
PW 10 Ex. 26 Jivabhai Laxmanbhai,
PW 11 Ex. 27 Chandubha Nanbhai,
PW 12 Ex. 29 Pratapsinh Jilubhai,
PW 13 Ex. 31 Hiraji Ravaji,
PW 14 Ex. 32 Dharamsinh Nanji,
PW 15 Ex. 40 Mukeshbhai Dhirajlal Mehta,
PW 16 Ex. 43 Sultanbhai Punjabhai,
PW 17 Ex. 44 Mahadevbhai Ababhai,
PW 18 Ex. 45 Chatussinh Dolatsinh,
PW 19 Ex. 46 Karamsinh Kurshibhai Desai,
PW 20 Ex. 47 Mahipatsinh Udesinh,
PW 21 Ex. 48 Eknath Gabaji Simpi.

In support of its case, the prosecution also produced documentary evidence in the nature of complaint lodged by Jetha Raghavbhai, panchnama of the scene of offence, discovery panchnamas, panchnama of the test identification parade, report of the Forensic Science Laboratory, postmortem notes, NC complaint lodged by accused no.1 at Mark-A, etc.

5. After recording of the prosecution evidence was over, the Respondents were questioned generally on the evidence led by the prosecution and their statements were recorded under S.313 of the Code of Criminal Procedure, 1973 (to be referred to as "the Code"). Defence of the respondents was that they were falsely involved in the

case. Respondent No.1 further stated that he had not lodged NC complaint Mark-A before Investigating Officer, PSI Simpi.

6. After appreciating the evidence led by the prosecution and after hearing the arguments of the learned Advocates for both the sides, the learned Addl. Sessions Judge recorded the following conclusions :

- (i) Evidence of Dr.Suresh Desai and the contents of the postmortem notes prove that Raghavbhai Valabhai died a homicidal death.
- (ii) Eye-witness Savaji Ramaji is a chance witness and his evidence on close scrutiny does not inspire confidence as he appears to be a got up witness.
- (iii) Conduct of eye-witness Jivanbhai Laxmanbhai makes his presence at the scene of incident doubtful because even though he had witnessed the incident, he had not disclosed the same to the complainant and other Village people.
- (iv) Oral evidence of Dhanji Ganesh who had identified the two accused, did not carry the prosecution case further that the respondents had committed murder of deceased Raghavbhai Valabhai because evidence of Dhanji Ganesh only proves that the respondents were found with their goats near the place of the incident.
- (v) Test Identification parade which was conducted by the Executive Magistrate Mukeshbhai Dhirajlal Mehta is reliable.
- (vi) Identification of the respondents alone is not sufficient to prove that the respondents were the assailants of deceased Raghavbhai Valabhai.
- (vii) Complaint Mark-A, which was alleged to have been lodged by accused no.1 on 22.4.1984 is recorded during the course of investigation and therefore the same is the statement of accused no.1 and hence it is hit by S.162 of the Code.
- (viii) Accused no.1 who was allegedly injured during the course of the incident, was sent to the Medical Officer for treatment, but the Doctor who treated him, was not examined in the court to prove the injury sustained by accused no.1.

(ix) Discovery panchnama of the muddamal stick does not inspire confidence.

7. On the basis of the above referred to conclusions the learned Addl. Sessions Judge acquitted the respondents of the offences punishable under S.302, 447 read with S.34 of the I.P.Code and S.161 of the Gujarat Panchayats Act, by giving them benefit of doubt, which has given rise to the present appeal by State of Gujarat.

8. Learned APP Mr.M.A.Bukhari has taken us through the entire evidence and has submitted that the learned Addl. Sessions Judge has erred in not relying on the evidence of two eye-witnesses who had actually seen the occurrence of the incident. He further submitted that the learned Addl. Sessions Judge ought to have relied on the evidence of the prosecution witnesses with regard to the identification of the respondents who were found near the place of the incident by witness Dhanji Ganesh. The learned APP further submitted that accused no.1 had voluntarily lodged NC complaint Mark-A, which proves that both the accused were the assailants who had committed murder of deceased Raghav Valabhai. It is submitted by the learned APP that the learned Addl.Sessions Judge erred in not believing the version of the prosecution witnesses and therefore, the appeal should be accepted.

9. On the other hand, the learned Senior Advocate Mr.P.M.Thakker for the respondents submitted that the learned Addl.Sessions Judge has given cogent and convincing reasons for not believing the two eye-witnesses which should not be disturbed by the court in the present appeal. It is submitted that Complaint Mark-A was not filed by accused no.1 voluntarily, but it was a statement recorded by the Investigating Officer during the course of investigation, which is hit by S.162 of the Code. It is pleaded that the investigation was already started on 21.4.1984, and as per the evidence of PSI Simpi, he had recorded statement of the respondents on 22.4.1984, and thereafter he is alleged to have recorded the complaint of accused no.1. Under the circumstances, the learned Senior Advocate for the respondents has claimed that no reliance should be placed on the NC complaint lodged by accused no.1 and the appeal should be dismissed.

10. The submission of learned APP that the learned Addl. Sessions Judge ought to have relied on the evidence of Savaji Ramaji and Jivabhai Laxmanbhai who posed as eye-witnesses is devoid of any merit. Both the said witnesses, who claimed to have witnessed the

occurrence of the incident, even though are related to the deceased had hidden themselves in their huts and had not come to the rescue of the deceased. In spite of their having witnessed the incident, they did not inform the complainant, nor any other relative, till the dead body of the deceased was buried in the evening on 21.4.1984. The conduct of both the witnesses is highly unnatural, and their presence at the scene of offence is doubtful.

11. The argument of the learned APP that PW 5 Dhanji Ganesh identified the respondents as the Bharwads who were seen with their cattle and goats near his Vadi has also no substance. At the most, the evidence of Dhanji Ganesh would show that the respondents were found along with their cattle near the Vadi of the witness. This piece of evidence does not establish that the respondents had trespassed in the Vadi and had committed murder of deceased Raghavbhai Valabhai by means of stick. The reason given by the learned Addl. Sessions Judge that the identification of the respondents does not establish beyond reasonable doubt that the respondents had committed murder of deceased Raghavbhai Valabhai is eminently just and proper, and does not require any interference.

12. The argument of the learned APP that the NC complaint Mark-A lodged by accused no.1 was voluntary and was not hit by S.162 of the Code is devoid of any merit. In KOLI MADHA JINA & OTHERS vs. STATE OF GUJARAT, 1985 G.L.H., 49, a similar question came up for consideration before the Division Bench of the Court, as to 'Whether the statement recorded during the course of investigation and which was styled as complaint, can be admitted in evidence? In the aforesaid case before the Division Bench, accused no.2 Daya Jina had given a complaint to the Police Officer on 16.7.1981, which was given Mark-A. The Division Bench considered admissibility of that complaint by referring to the decision of this High Court in the case of RABARI KHIMA GANDA vs. STATE OF GUJARAT, 20 (1979) GLR, 847. The Division Bench after referring to the judgment in RABARI KHIMA GANDA's case (supra) held that Mark-A was not a complaint given by the accused voluntarily, and the said complaint was not filed with a view to putting the criminal law into motion. It was further held that the statement of the accused came to be recorded under S.161 of the Code by the Investigating Officer and during recording of that statement, it was tried to be shown that the accused made a version that he had a case for filing complaint. The Division Bench referred to the observations of the Court in RABARI KHIMA GANDA's case (supra), which are as under:

" Thus, whether a document produced as a counter-complaint in a given case after investigation has started upon another complaint is inadmissible in evidence under Sec.162(1) of the Code, depends upon the facts and circumstances of each case."

and held that the alleged complaint lodged by the accused was not filed voluntarily to put criminal law into motion and therefore, is hit by S. 162 of the Code.

13. In the present case, accused no.1 in his further statement has denied that he had lodged complaint Mark-A before PSI Simpi. PSI Simpi in para 2 of his deposition admitted that before recording complaint of accused no.1, statement of the accused under S.161 of the Code were recorded. As stated above, complaint for the murder of Raghavbhai Valabhai was already lodged on 21.4.1984 at 17.0 hours, and investigation of that complaint had already begun. Statements of the accused came to be recorded on 22.4.1984 as deposed by PSI Simpi. PSI Simpi under the guise of complaint Mark-A in fact recorded the statement of accused no.1, during the course of investigation. In RABARI KHIMA GANDA's case (supra), it is observed as under :

" As against the aforesaid illustration, we can also conceive of a case in which the accused does not want to file a counter-complaint. Such an accused would be examined under Section 161(1) of the Code by the investigating officer; and in the course of his statement, he gives out a version showing that he had a case for filing of a complaint. An intelligent investigating officer in such a case would get a complaint of the accused recorded instead of recording his statement and when the occasion arises, he would use that complaint against the accused at the trial. That complaint which may not amount to confession, would contain some admissions of fact which may ultimately be used at the trial against the accused".

The above observation of the Division Bench makes it abundantly clear that if the statement amounted to confession, the question of admitting it in evidence does not arise. The Supreme Court in the case of AGHNOO NAGESIA vs. STATE OF BIHAR, AIR 1966 SC 119, held that even an incriminating statement will amount to confession which is hit by S.25 of the Evidence Act, if made to a

Police Officer. Therefore, a statement or part of a statement which amounts to confession cannot naturally be used against the accused. The Supreme Court, in the case of AGHNOO NAGESIA (supra) held that when the statement in the FIR given by an accused contains incriminating materials and it is difficult to sift the exculpatory portion therefrom, the whole of it must be excluded from evidence.

14. In the present case, it is alleged by the prosecution that accused no.1 had lodged NC Complaint Mark-A before PSI Simpi. The FIR is not a substantive piece of evidence, and can only be used to corroborate the statement of the maker under S.157 of the Evidence Act or to contradict it under S.145 of the Evidence Act. It cannot be used as evidence against the maker at the trial, if he himself becomes an accused, or to corroborate or to contradict other witnesses [See: NISAR ALI vs. THE STATE OF U.P., AIR 1957 SC 366]. Looking to the facts of the present case, the accused no.1 had not offered himself to be examined as a witness, and therefore, Mark-A is not an evidence in the eye of law.

15. The Supreme Court in the case of BANDLAMUDDI ATCHUTA RAMAIAH AND OTHERS vs. STATE OF ANDHRA PRADESH, 1996 AIR SCW 3886, had an occasion to consider the FIR furnished by the accused. The Supreme Court in the case before it considered the provisions of Ss. 21 and 24 of the Evidence Act, in connection with the FIR lodged by the accused and held as under :

" The legal position, therefore, is this : A statement contained in the FIR furnished by one of the accused in the case cannot, in any manner, be used against another accused. Even as against the accused who made it, the statement cannot be used if it is inculpatory in nature nor can it be used for the purpose of corroboration or contradiction unless its maker offers himself as a witness in the trial. The very limited use of it is as an admission under section 21 of the Evidence Act against its maker alone unless the admission does not amount to confession. "

16. In view of the principle laid down by the Supreme Court in the abovereferred to decisions, Mark-A which is an NC Complaint lodged by accused no.1 cannot be called an evidence to connect him with the commission of crime. Accused no.1 never intended to put the criminal law into motion. In our opinion, Mark-A cannot be pressed into service against the respondents in support of the

argument that the respondents had admitted their presence at the scene of offence and had also admitted that they inflicted blows on the head of deceased Raghavbhai Valabhai with iron-shod stick and caused his death. The learned Addl. Sessions Judge is justified in rejecting Mark-A alleged to have been lodged by accused no.1. In our view, the conclusion arrived at by the learned Addl. Sessions Judge is eminently just and proper and does not require interference in this appeal.

17. This is an acquittal appeal in which court would be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal, more particularly when the evidence has not inspired confidence of learned Judge who had opportunity to observe the demeanour of the witnesses. As we are in general agreement with the view expressed by the learned Judge, we do not think it necessary either to reiterate the reasons for acquittal given by the trial Court, and in our view, expression of general agreement with the view taken by the learned Judge would be sufficient in the facts of the present case. This is so, in view of the decisions rendered by the Supreme Court in the cases of (1) GIRIJA NANDINI DEVI & ORS. vs. BIJENDRA NARAIN CHAUDHARY, AIR 1967 SC 1124, and (2) STATE OF KARNATAKA vs. HEMA REDDY AND ANOTHER, AIR 1981 SC 1417. On overall appreciation of evidence, we are satisfied that there is no infirmity in the reasons assigned by the learned Judge for acquitting the accused. Suffice it to say that the learned Judge has given cogent and convincing reasons for acquitting the accused and the learned Additional Public Prosecutor has failed to dislodge the reasons given by the learned Judge in order to convince us to take the view contrary to the one already taken by the learned Judge.

15. For the foregoing reasons, we do not see any merits in the appeal, and the appeal is liable to be dismissed. The appeal therefore, fails and is dismissed. Muddamal articles are ordered to be disposed of in terms of the directions given by the learned trial Judge in the impugned judgment.

abraham.

